Supreme Court, U.S.
FILED
NOV 18 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 209

RONALD E. KAY,

Petitioner,

-vs-

THE FLORIDA BAR,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

GEORGE R. GEORGIEFF
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

Counsel for The Florida Bar

W. GEORGE ALLEN
305 Medical Towers Bldg.
303 S. E. 17th Street
Ft. Lauderdale, Florida
33316

Assistant Counsel for The
Florida Bar.

TOPICAL INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1-2
QUESTIONS PRESENTED	2
DISCIPLINARY RULE INVOLVED	2-3
STATEMENT	3-4
STATEMENT OF THE FACTS	4-7
REASONS FOR DENYING THE WRIT	7-21
CONCLUSION	22

TABLE OF CASES

PAGE

Britt v. Superior Court, 374 P.2d 817 (1962). 8, 18

Cohen v. Hurley, 366 U.S. 117, 6 L.ed.2d 156, 81 S.Ct. 955 (1961). 7-8

Ex Parte Wall, 107 U.S. 265, 27 L.ed. 552, 2 S.Ct. 569 (1883) . .10, 14, 16

Florida Bar v. Kay, 232 So.2d 378. .1

Florida Bar v. Massfeller, 170 So. 2d 834 (Fla. 1964). 15

Gould v. State, 127 So. 309 (Fla. 1930) 15

Katz v. U.S., 339 U.S. 347, 19 L.ed.2d 576, 88 S.Ct. 507 (1967). 19, 20

Peel v. State, 150 So.2d 281 (1963).13

Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796, 77 S.Ct. 752 (1957). 8

Selling v. Radford, 243 U.S. 46, 49.14

Spevak v. Klein, 385 U.S. 511, 17 L.ed.2d 574, 87 S.Ct. 625 (1967). 8

PAGE

State v. Coyle, 181 So.2d 671 (3 DCA, 1966) 17, 18

State ex rel. Florida Bar v. Dawson, 111 So.2d 427 (Fla. 1959) 15-16

State ex rel. Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954) 15

Waller v. Florida, ____ U.S. ____, 25 L.ed.2d 435, 90 S.Ct. ____ (1970) 10, 20

RULES

Rule 11.01 (1), Article XI, Integration Rule, Florida Bar. 16

Rule 11.02 (3) (a), Article XI, Integration Rule, Florida Bar. 2, 3, 15

STATUTES

Section 775.08, Florida Statutes. . 9

Section 800.01, Florida Statutes. . 9, 10, 17, 19

Section 800.02, Florida Statutes. . 17, 19

Section 800.03, Florida Statutes. . 17, 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 209

RONALD E. KAY,

Petitioner,

-vs-

THE FLORIDA BAR,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Respondent concedes that the opinion of the Florida Supreme Court which resulted in petitioner's disbarment and attached by him as Appendix A and which may be found at the Florida Bar v. Kay, 232 So.2d 378, is as represented in the printed text thereof.

JURISDICTION

For whatever difference it may make in the ultimate disposition of the matter before the Court, respondent concedes

that petitioner's attempt to seek relief from this Court was timely commenced.

That his petition should not result in the relief requested will, for reasons shown hereafter, of course, be argued.

QUESTIONS PRESENTED

The questions presented by petitioner at page 2 of his petition as follows:

"1. Whether the disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is a denial of due process of law.

"2. Whether Rule 11.02 (3) (a) of Article XI of the Integration Rule of the Florida Bar is void for vagueness and is impermissibly overbroad in violation of due process of law and unconstitutionally invades the right of privacy.

"3. Whether disbarment of an attorney, predicated upon a single, isolated act of homosexuality, entirely unrelated to the practice of law, is too severe a penalty."

are fairly acceptable and do appear to limn the issues which may be involved.

DISCIPLINARY RULE INVOLVED

Rule 11.02 (3) (a) of Article XI of the Integration Rule of the Florida Bar reads as follows:

"The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts, in the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct to be construed as tolerance thereof. The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline."

STATEMENT

So much of petitioner's statement as purports to set out the facts pursuant to which he was arrested, charged under the ordinances of the City of Ft. Lauderdale, and convicted in the municipal court thereof is a reasonably accurate resume except in the following particulars:

(1) when arraigned on the charge in municipal court, petitioner stood mute and the court accordingly entered a plea of not guilty for him;

(2) at no time through the appellate process which followed the municipal conviction did he or anyone on his behalf ever raise as an issue on appeal any question with regard to the sufficiency of the evidence to sustain the charge; and

(3) at the disbarment hearing before the Honorable John W. Douglass, referee, petitioner took the position that engaging in the practice of law was a privilege rather than a right.

STATEMENT OF THE FACTS

On December 1, 1966, between 12:00 noon and 2:15 o'clock P. M., Officer Gerald Wilson, a uniformed police officer of the City of Fort Lauderdale, was observing persons in the public toilet of Stranahan Park in downtown Fort Lauderdale, through an adjustable louvered vent between the toilet and an adjacent utility room which was the hiding place of the officer.

The police officer observed homosexual activities taking place between an adult white male named John Mathew McGrath who was seated on one of the toilets and at least three other adult white and black males waited in turn for their opportunity to place their penis in McGrath's mouth. The police officer testified that petitioner was present in the men's toilet while a third party black adult male,

Marvin West, Jr., was in the act of placing his penis in the mouth of McGrath who was seated on the toilet a few feet from the louvered opening through which the officer was spying. The officer, who had never seen Kay before, testified that Kay was in the toilet when an unknown white male was committing the same act with McGrath; that Marvin West, Jr., entered at this point; that West then received McGrath's favors next and that Kay waited all this time with his penis exposed before he too placed his penis in McGrath's mouth.

The police officer's testimony was corroborated by West.

The officer placed the petitioner Kay, the white male McGrath and the black male West under arrest but was unable to locate the other adult male who had also participated in the activity with McGrath. All were charged in the Municipal Court of the City of Fort Lauderdale with Indecent Exposure in violation of Section 28-25 of the Code of Ordinance of the city.

The negro, Marvin West, Jr., plead not guilty and after trial was found guilty and fined one hundred fifty dollars ($150) plus a mandatory jail sentence of thirty (30) days. McGrath entered a plea of guilty through his attorney and was fined two hundred dollars ($200) plus a thirty (30) day suspended jail sentence.

At the trial of petitioner on May 4, 1967, the white male McGrath was

subpoenaed as a witness for the City of Fort Lauderdale. McGrath invoked the protection of the Fifth Amendment in response to the question, "Mr. McGrath did you take into your mouth Ronald Kay's penis?"

The municipal judge, after hearing all of the evidence, took the case under advisement and rendered a finding of guilty on May 9, 1967. The Judge, Stephen R. Booher, enjoys an excellent reputation of being very deliberate and careful and was particularly careful in this case as evidenced by the fact that the judge actually viewed the scene himself. The attorney for petitioner had contended that it was a physical impossibility for the police officer to have seen what he claimed to have seen, but obviously the judge was satisfied after viewing the area personally.

At the hearing before the referee, counsel for the Bar and for the petitioner stipulated that the transcript of the municipal court of record be introduced in lieu of bringing the live witnesses to the hearing. The only witnesses before the referee were the expert who administered a lie detector test to the petitioner and the petitioner. The expert stated his belief that petitioner was speaking the truth when he denied the charges made against him by the police officer.

At the hearing before the referee, the referee found that petitioner did not testify under oath with candor before the municipal court and also found that there

is serious conflict between his sworn testimony before the municipal court and his sworn testimony before the Grievance Committee in that petitioner testified before the municipal court that he saw nothing out of the ordinary going on in the restroom and he later admitted that he was well aware that homosexual activities were taking place when he first entered the restroom on the day in question in his testimony before the Grievance Committee.

While there are conflicts in the testimony, the referee found that the overwhelming weight of the evidence clearly shows that the petitioner, Ronald E. Kay, while a member of The Florida Bar did, in a public place in the City of Fort Lauderdale, within view of a police officer of the City of Fort Lauderdale, and other adult males, publicly indulge in homosexual activities contrary to good morals.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court's decision below in no way prevented petitioner from practicing law without due process.

Whether we take the position advanced by petitioner before the referee at the disbarment proceeding that the practice of law was but a privilege or the view he now takes that the same is a right, we are satisfied that all thinking persons would agree that due process must be the predicate to the disbarment of any attorney. See Cohen v. Hurley, 366 U.S. 117, 6 L.ed.

2d 156, 81 S.Ct. 955 (1961); Spevack v. Klein, 385 U.S. 511, 17 L.ed.2d 574, 87 S.Ct. 625 (1967); and Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796, 77 S.Ct. 752 (1957).

So it is that in this proceeding it ought not to matter how one characterizes the practice of law--the only proper inquiry being whether petitioner was denied due process below.

Initially, we are told under the first division of his complaint that even if everything is as the record below will show it to be, a single act of homosexuality between consenting adults (in this day and time) simply cannot be a sufficient basis for disbarment within the concept of due process.

The particulars of the record below will show no denial of the fact that petitioner's homosexual act occurred in a public restroom within the view of an observing police officer [or anyone else who chose to wander in]. That made his act, unlike that in Britt v. Superior Court, 374 P.2d 817 (1962), very public.

Taking that position to its logical end, petitioner would have to agree that if these same two individuals were to elect to commit the same homosexual act on the lawn of the park outside, it would not matter one whit.

When in the washroom, petitioner knew there were no doors on the commode stalls

and he nevertheless elected to be a willing participant in a criminal act. He thereby entered upon such act with the knowledge that anyone walking in, or then on the scene, could observe the results with relative ease. That it is a criminal act of real magnitude in the State of Florida, one need only turn to Section 800.01, Florida Statutes, in order to divine that one found guilty of the abominable and detestable crime against nature may be sentenced to the state prison for twenty (20) years--automatically a felony. See Section 775.08, Florida Statutes.

Petitioner seems to take comfort from the special concurring opinion of the Chief Justice of the Florida Supreme Court who opined that in this case the Florida Bar was imposing its own personal moral judgment upon the petitioner. He sought to buttress this conclusion by a claim that no nexus had been established as between the admitted moral transgression and the practice of law. Indeed, petitioner strongly urges that to this Court. We hasten to correct any misapprehension on either his or anyone else's part: that was not the opinion of the majority of the court. Indeed, they thought so little of that position that it does not even form a part of the order entered.

We are asked to believe that the Board of Governors of the Bar of the State of Florida have imposed their moral judgment on petitioner. The only honest response to that entreaty is that the <u>people</u> of the State of Florida by and through the

enactment of Section 800.01, supra, made the moral judgment about which petitioner complains.

We would be less than honest if we did not admit that because of this Court's recent decision in the case of Waller v. Florida, ___ U.S. ___, 25 L.ed.2d 435, 90 S.Ct. ___ (1970), there appears no way in which petitioner could be brought to task on the felony charge. We also add that Waller, supra, was not in existence at the time the Florida Supreme Court entered its order disbaring petitioner.

Be the above as it may, as far back as 1883, this very Court, in Ex Parte Wall, 107 U.S. 265, 27 L.ed. 552, 2 S.Ct. 569 (1883), concluded that in no sense was it critical to a disbarment that a "conviction" for a criminal offense be in existence before disbarment could lawfully obtain.

Ex Parte Wall, supra, was a Florida case which had its genesis in Tampa, Florida. Almost immediately after Wall, a local attorney, was found to have fomented and participated in the lynching of a prisoner then held in the Hillsborough County Jail, the matter was brought to the attention of the federal district judge who, after due notice and a hearing, ordered Wall's name struck from the roll of the court. Wall appealed

to this Court and this Court affirmed the action of the district judge in so doing. Wall had never been charged with a crime. Indeed, that was one of his defenses and it formed the touchstone of the dissenting opinion.

Within that decision this Court concluded that there might be many reasons why "a technical conviction" was not required prior to disbarment. Indeed, with a two year statute of limitations in Florida, we wonder at how many times a practicing lawyer, successful in avoiding detection within that interval, could then with impunity brag that he had committed all sorts of non-capital crimes and then defy disbarment! We cannot believe that the only instance in which a disbarment such as that here under consideration could or should be upheld would be one in which a man had been fully and finally convicted of the most vicious of crimes that all would agree brand him a beast. Nor can we agree with petitioner's contention that since this was proved to be only a once happening thing that he was not a proper subject for disbarment as a result thereof. The question redounds: how many times must the commission of a criminal act be proved before disbarment may follow? Need the offender be a multiple rapist or conspirator? Indeed, had petitioner been convicted of the felony proscribed by Section 800.01, supra, a simple certification of the judgment would have been all that was necessary for disbarment rather than the extensive hearing

held by the referee. To accept petitioner's assertion in this area would indeed be to elevate form over substance.

One must wonder at petitioner's rationale in suggesting the absence of any nexus between his criminal act and whether he could continue to perform as an effective lawyer in Florida.

If we can believe the sociologists and penologists of the day, we are told that most of the killings for which people are incarcerated are committed by very ordinary people who follow very ordinary pursuits and not by professional brigands who prey on mankind and threaten to take their lives on the slightest whim. Truly, this Court could almost take judicial knowledge of the fact that far and away the greatest number of murders are committed by people not unlike ourselves.

How do you show a nexus (vis-a-vis the practice of law) between a usually non-violent person who happens to be a lawyer and who, on Christmas morning, kills his wife with the new pistol she just gave him? He certainly is never apt to do it again and in nowise does it keep him from handling uncontested divorces, reading abstracts or filing petitions in bankruptcy by and on behalf of his clients. Indeed, a respected judge who masterminds and is directly responsible for the murder of a

circuit judge and his wife is no doubt still able to tell a voluntary confession from an involuntary one. See Peel v. State, 150 So.2d 281 (1963). The whole point is that if you must show how a societal aberration (criminal act) admittedly committed by a practicing attorney affects the fashion in which he serves the bench and the bar, you might just as well forget about disbarment except when the crime or act is one directly against a client whom he represents or the bar of which he is a member or the judge of the court in which he is appearing. No one among us is foolish enough to think that those instances would number more than half a handful in a lifetime. So it is that under petitioner's position we are left with the proposition that embezzling lawyers will always be disbared if they dip into their client's trust account but murdering lawyers neither can be nor should be. Terminally, we ask: has it really come to that?

Perhaps human activity will one day decree that homosexual behavior between consenting adults, even in public places, is no longer a crime; in which case, proceedings such as this one will be history. Until that day, there ought to be precious little, if indeed any, question but that an individual who happens to be a licensed attorney in Florida may not urge that despite the fact that he was found guilty of having committed acts which were a homosexual crime, he should not be disbarred.